Government Administration and Elections Committee
Connecticut General Assembly
March 20, 2023

Testimony of Campaign Legal Center in Support of Senate Bill 1226

I. INTRODUCTION

Campaign Legal Center ("CLC"), is pleased to offer this testimony in support of House Bill 1104, the Connecticut Voting Rights Act ("SB 1226" or the "CTVRA").

CLC is a nonpartisan, nonprofit organization dedicated to advancing democracy through law. Through its extensive work on redistricting and voting rights, CLC seeks to ensure that every United States resident receives fair representation at the federal, state, and local levels. CLC supported the enactment of state voting rights acts in Washington, Oregon, Virginia, and New York, and brought the first-ever litigation under the Washington Voting Rights Act in Yakima County, Washington.

CLC strongly supports SB 1226 because it will allow communities of color across Connecticut to participate equally in the election of their representatives. The focus of CLC's testimony will be to highlight the various procedural benefits that Sections 2 and 7 of SB 1226 will provide to voters and local governments alike in enforcing voting rights and protecting communities of color.

II. BACKGROUND

States can offer new hope for voters by adopting state voting rights acts that improve upon their federal counterpart. By passing the CTVRA, Connecticut can reduce the cost of enforcing voting rights and make it possible for traditionally disenfranchised communities to enforce their rights. States can clarify that government-proposed remedies do not get deference as they might

in federal court. Importantly, they can also empower state courts to apply a wider range of locally tailored remedies that better serve communities of color.

Passage of the CTVRA will mark a new era of voter protections for the people of Connecticut, building upon the model of the federal Voting Rights Act (VRA) of 1965 with several key improvements. CLC's testimony will share highlights of how filing a claim under this state voting rights act rather than the federal VRA is an improvement, such as with vote dilution claims and available remedies.

The federal VRA is one of the most transformative pieces of civil rights legislation ever passed. Section 2 of the federal VRA "prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in [a] language minority group." The 1982 amendments to Section 2, which allowed litigants to establish a violation of the VRA without first proving discriminatory intent, created a "sea-change in descriptive representation" across the country.[1]

Despite this success, "litigating Section 2 cases [is still] expensive and unpredictable."[2] Plaintiffs must often collect mountains of evidence to support the totality of circumstances inquiry, which means extended discovery periods and long trials. Given the heavy burden of proving a violation of Section 2 of the federal VRA, states serve a vital role in protecting and expanding the rights to vote and participate fully in American democracy. Connecticut should take advantage of this opportunity and join several other states—California, Washington, Oregon, Virginia, and most recently, New York—in ensuring all of its citizens have equal access to the democratic process.

The CTVRA will apply more efficient processes and procedures to enforcing the voting rights of traditionally disenfranchised communities, saving Connecticut time and money when going through voting rights litigation. Section 2 of the CTVRA makes it less costly for minority voters and their jurisdictions to collaboratively develop a remedy before resorting to expensive litigation.

III. REASONS TO SUPPORT SB 1226

The CTVRA will innovate on the federal VRA, as well as other state VRAs, by streamlining the procedural mechanisms by which voters may state a claim of vote dilution. The private right of action for voting discrimination under Section 2 of the CTVRA is a less costly and less burdensome means of enforcing voting rights for communities of color and encourages negotiation between

[1] Michael J. Pitts, The Voting Rights Act and the Era of Maintenance, 59 ALA. L. REV. 903, 920-22 (2008).
[2] Christopher S. Elmendorf & Douglas M. Spencer, Administering Section 2 of the VRA After Shelby County, 115 COLUMBIA L. REV. 2143, 2157 (2015).

voters and elected governments. As discussed below, the following features of the CTVRA are reasons to support the bill:

- The CTVRA's presuit notice provisions allow jurisdictions to proactively remedy potential violations.
- The CTVRA provides express statutory guidance to ensure courts interpret voting-related conflicts in favor of the right to vote.
- The CTVRA provides a framework for determining whether vote dilution or vote denials have occurred that is tailored to the barriers to voting communities of color face at the local level.
- The CTVRA prioritizes remedies for voting discrimination that enable communities of color to equally participate in the franchise.

A. SB 1226 avoids lengthy litigation by allowing jurisdictions to proactively remedy potential violations.

As set forth in § 2(g)(2)(A) of the CTVRA, a prospective plaintiff must send a jurisdiction written notice of a violation and wait 50 days before bringing a lawsuit. During that time or before receiving any notice, the jurisdiction may remedy a potential violation on its own initiative and gain safe harbor from litigation for at least 90 days. § 2(g)(2)(B). The CTVRA recognizes that many jurisdictions will seek to enfranchise communities of color by remedying potential violations. Such notice and safe-harbor provisions will enable them to do so without the costs and delay of lengthy litigation.

The CTVRA also provides for limited cost reimbursement for pre-suit notices, in recognition of the fact that notice letters often require community members to hire experts to perform statistical analysis, and to ensure that such expenses do not prevent people from enforcing their civil rights. § 2(g)(2)(E). Similar provisions are already part of voting rights acts in California, Oregon, and New York. There is a cap of $50,000 on compensation for these costs to ensure that communities of color have the resources they need to enforce their rights while also protecting local governments from exorbitant fee requests. § 2(g)(2)(E).

In contrast, no such presuit provision exists in Section 2 of the federal VRA. As a result, voters often spend time and money well in excess of $50,000 to investigate potential violations of the federal VRA, the cost of which is later borne by the taxpayer. A notice provision might have saved Bridgeport, Connecticut taxpayers countless dollars. In *Bridgeport Coalition for Fair Representation v. City of Bridgeport,* the city defendant spent years defending its illegal method of elections, and ultimately settled with the plaintiffs and paid $175,000 in attorney's fees.[3] As the Mayor of Bridgeport noted, the

[3] *See infra,* note 13 and accompanying text.

litigation was "expensive and protracted."[4] Under the CTVRA, the parties could avail themselves of the notice provisions and settle before the filing of a lawsuit—within months, not years.

B. SB 1226 will provide guidance to Connecticut State judges as they interpret laws, policies, procedures, or practices that govern or affect voting.

The CTVRA specifies that judges should resolve ambiguities in Connecticut state and local election laws in favor of protecting the right to vote. *See* § 7. This language echoes the Connecticut Constitution's explicit guarantees that "political power is inherent in the people"[5] and that laws "shall be made to support the privilege of free suffrage."[6]

This clarification provides a default pro-voter rule for judges interpreting laws, policies, procedures, or practices that govern or affect voting, which will reduce litigation costs by avoiding unnecessary arguments over statutory interpretation. Similar provisions are in the New York Voting Rights Act and in Voting Rights Acts recently proposed in Connecticut and New Jersey.

C. SB 1226 provides a framework for determining vote dilution in a way that is efficient and cost-effective for both voters and jurisdictions.

To bring a vote dilution claim under Section 2 of the federal VRA, a plaintiff must show that: (1) the minority group being discriminated against is sufficiently large and geographically compact to constitute the majority of voters in a single-member district; (2) there is racially polarized voting; and (3) white bloc voting usually prevents minority voters from electing their candidates of choice. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If these three conditions are met, the court then considers whether, under the totality of the circumstances, the practice or procedure in question has "the result of denying a racial or language minority group an equal opportunity to participate in the political process."

The CTVRA improves on the federal VRA in several ways: it ensures that integrated as well as segregated communities of color are able to influence elections and elect their candidates of choice; it provides plaintiffs an alternative to proving racially polarized voting; it sets out practical guidelines

[4] Edmund Mahoney, *Bridgeport's Redistricting Suit Settled*, Hartford Courant (Mar. 10, 1995), https://www.courant.com/news/connecticut/hc-xpm-1995-03-10-9503100390-story.html.
[5] Conn. Const. art. I, § 2.
[6] Conn. Const. art. VI, § 4.

for courts to properly assess racially polarized voting; and it clarifies that coalitions made up of two or more protected classes to bring vote dilution claims.

Unlike the federal VRA, the CTVRA does not require communities of color to be segregated residentially to receive protections under the statute. Like the voting rights acts passed in California, Washington, Oregon, Virginia, and New York, the CTVRA does not demand that the minority group being discriminated against prove that it is "sufficiently large and geographically compact" before being able to proceed with its lawsuit. *See* § 2(b)(2)(B). Following the passage of civil rights legislation, residential segregation has decreased in some areas of the United States, yet racially polarized voting and underrepresentation of communities of color persist. Thus, many communities of color that do not face residential segregation may still lack equal opportunities to elect candidates of choice to their local government. By not requiring minority communities to be segregated to prove minority vote dilution, the CTVRA takes this reality into account.[7]

Decades of experience litigating cases under Section 2 of the Voting Rights Act have shown that that the numerosity and compactness requirements for vote dilution claims are an unnecessary barrier to remedying significant racial discrimination in voting. The CTVRA will allow violations to be remedied quickly and at much less expense to taxpayers than existing federal law and make it easier for communities of color to vindicate their rights and obtain remedies to resolve racial vote dilution. In previous federal VRA cases in Connecticut, voters have had to spend time and money defending against allegations that voters of color were not sufficiently segregated to meet this condition, despite evidence making it clear that voters were denied the equal opportunity to elect their candidate of choice.[8]

The next requirement for a vote dilution claim under the federal VRA is for the plaintiffs to show racially polarized voting. Racially polarized voting (RPV) means that there is a significant divergence in the electoral choices or candidate preferences of protected class voters, as compared to other voters. Measuring RPV often depends on election return data, which is sometimes unavailable, especially in smaller jurisdictions and in places with long histories of vote dilution and disenfranchisement where candidates preferred by minority voters simply stop running for office. Thus, the effect of vote

[7] Like VRAs in other states, the CTVRA does allow courts to consider whether a community is sufficiently numerous and geographically segregated in determining a remedy to a vote dilution violation. *See* § 2(b)(2)(B).

[8] *See generally Bridgeport Coal. for Fair Representation v. City of Bridgeport,* No. CIV. 3:93CV1476(PCD), 1993 WL 742750 (D. Conn. Oct. 27, 1993).

dilution itself means that minority communities will often be hard pressed to find "proof" that RPV exists in actual election results.

This is why it is critical that the CTVRA has two paths to prove a vote dilution case, not just a one-size-fits-all approach. The first path allows affected voters to prove vote dilution by showing that a jurisdiction maintains a dilutive at-large or other system of election and RPV is present. §§ 2(b)(2)(A)(i), 2(c)(1). The CTVRA also sets out reliable and objective standards for courts to apply in their assessment of RPV. § 2(b)(2)(B).

But where election results used to assess RPV are unavailable, the CTVRA also allows affected voters to show that they are nevertheless denied equal opportunity to participate in the political process under the totality of the circumstances. §§ 2(b)(2)(A)(ii), 2(c)(1). This path allows plaintiffs to introduce expert and fact evidence under a range of relevant factors identified by the Supreme Court, Congress, and other courts to demonstrate that the challenged map or method of election, in the words of the United States Supreme Court, "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [protected class voters] and white voters to elect their preferred representatives" or influence the outcome of elections.[9]

Finally, the CTVRA allows two or more protected classes of voters within an election district to bring a coalition claim, so long as they can establish that they are politically cohesive. § 2(d). Coalition claims reflect the CTVRA's spirit and intent to protect all communities of color from discriminatory voting rules and election systems, whether they impact one or more than one racial or ethnic group. If two or more communities vote in a bloc together, organize to elect candidates together, and tend to suffer from vote dilution together, they should be able to work together to prove it and combat it.

D. SB 1226 provides a framework for determining denials of the right to vote that provides clarity to courts and voters alike.

The CTVRA provides a stronger standard for proving that a challenged practice denies or impairs a protected class's access to the ballot. Under the federal VRA, voters may challenge practices which "result in a denial or abridgement" of the right to vote because of race or color. 52. U.S.C. § 10301. The Supreme Court, however, greatly limited the kinds of claims that voters could make in *Brnovich v. DNC,* 141 S.Ct. 2321 (2021). Specifically, the Supreme Court set forth additional "guideposts" for proving vote denials that will make Section 2 claims even more costly and time consuming to litigate. Furthermore, the lack of clarity provided in *Brnovich* leaves federal courts in the lurch about the appropriate way to interpret vote denial claims under Section 2.

[9] *See, e.g.*, *Gingles v. Thornburg*, 478 U.S. 30, 47 (1986).

The CTVRA fills in that gap by prohibiting a local government from enacting any voting practice which will "result[] in the impairment of the right to vote" of communities of color. § 2(a)(1). A violation is established by showing *either* that that the practice results in a disparity in the ability of voters of color to participate in the electoral process, *or* that, under the totality of circumstances, the practice results in an impairment of the ability of voters of color to participate in the franchise. § 2(a)(2). Under the federal law, on the other hand, voters have to show (among other things) both a statistical disparity and an impairment under the totality of the circumstances. This innovation of the CTVRA will allow voters of color to show that voting discrimination has occurred without having to jump over unnecessary burdens of proof. Furthermore, because the standard is more explicit under the CTVRA, state courts will have proper guidance about how to determine whether a violation has occurred.

E. SB 1226 expands the remedies that communities of color can seek to ensure their electoral enfranchisement.

Under the CTVRA, if a violation of Section 2 is found, the court shall order appropriate remedies that are tailored to address the violation in the local government and prioritize the full and equitable participation access of voters. The court may only take such action if the remedy will not impair the ability of the protected class of voters to participate in the political process. This part of the bill recognizes that vote denial and vote dilution tactics take many different forms and are not solely limited to traditional methods of voter discrimination. Examples of such remedies from the language of § 2(e) of the CTVRA include replacing a discriminatory at-large system with a district-based or alternative method of election; new or revised redistricting plans; adjusting the timing of elections to avoid known dips in turnout; and adding voting hours, days, or polling locations.

The CTVRA also specifies that courts may not defer to a proposed remedy simply because it is proposed by the local government. § 2(e)(2). This directly responds to an egregious flaw in the federal law, where Section 2 has been interpreted by the federal courts to grant government defendants the "first opportunity to suggest a legally acceptable remedial plan."[10] This often leads to jurisdictions choosing a remedy that only minimally addresses a discriminatory voting practice rather than fully enfranchising those who won the case. For example, in *Bridgeport Coalition for Fair Representation v. City of Bridgeport,* the court declined to order plaintiffs' proposed remedial plan after finding that the City's method of elections violated Section 2 of the federal Voting Rights Act, because "to do so would not defer to nor permit the City's

[10] *Cane v. Worcester County*, 35 F.3d 921, 927 (4th Cir. 1994)

choice of method by which the law is enforced."[11] After years of litigation—challenging the court's decision all the way to the Supreme Court[12]—the City of Bridgeport ultimately settled the litigation and adopted the plaintiffs' map.[13] In other words, the court's deference to the defendant city's preferred remedy led to more protracted and redundant litigation.

This is antithetical to the concept of remedying racial discrimination; courts should not defer to the preferences of a governmental body that has been found to violate anti-discrimination laws in fashioning a remedy for that body's own discriminatory conduct. The CTVRA avoids this problem by allowing the court to consider remedies offered by *any* party to a lawsuit, and prioritizing remedies that will not impair the ability of protected class voters to participate in the political process.

This bill also promotes settlement through this specification that courts must weigh all proposed remedies equally and decide which one is best suited to help the impacted community, instead of giving deference to the remedy proposed by the government body that violated that community's rights.

IV. CONCLUSION

We strongly urge you to enact SB 1226 and strengthen voting rights in the state of Connecticut. SB 1226 signifies a pivotal inflection point for the state of Connecticut to lead in protecting voting rights, offering a more efficient and lower cost layer of oversight for communities. Thank you.

Respectfully submitted,

/s/ Valencia Richardson

Valencia Richardson, Legal Counsel
Lata Nott, Senior Legal Counsel
Aseem Mulji, Legal Counsel
Campaign Legal Center

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[11] *Bridgeport Coal. for Fair Representation v. City of Bridgport*, No. CIV. 3:93CV1476(PCD), 1993 WL 742750, at *6 (D. Conn. Oct. 27, 1993).
[12] *City of Bridgeport, Conn. v. Bridgeport Coal. For Fair Representation*, 512 U.S. 1283, 115 S. Ct. 35, 129 L. Ed. 2d 931 (1994) (vacating decisions below and remanding for further consideration in light of *Johnson v. De Grandy*, 512 U.S. 997 (1994));
[13] Stipulation of Dismissal, *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, No. 3:93-cv-01474 (D. Conn. Mar. 9, 1995), ECF No. 151; Edmund Mahoney, *Bridgeport's Redistricting Suit Settled*, Hartford Courant (Mar. 10, 1995), https://www.courant.com/news/connecticut/hc-xpm-1995-03-10-9503100390-story.html.

1101 14th St. NW, Suite 400
Washington, DC 20005